IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CORY LYNN STONER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12012 Trial Court No. 3AN-13-1297 CR MEMORANDUM OPINION No. 6310 — April 6, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Warren W. Matthews, Judge.

Appearances: Michael A. Moberly, Hozubin, Moberly, Lynch & Associates, Anchorage, for the Appellant. Ben Wohlfeil, Assistant District Attorney, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Kossler, Judges.

Judge KOSSLER, writing for the Court.
Judge MANNHEIMER, concurring.

A jury convicted Cory Lynn Stoner of four offenses — second-degree theft of an access device, second-degree forgery, attempted fraudulent use of an access device, and attempted third-degree theft — for his unsuccessful attempt to cash a stolen check

at a Wells Fargo bank branch in Anchorage.[1] Stoner appeals, bringing three claims: (1) that the evidence was insufficient to show that he had the requisite culpable mental states for the four convictions; (2) that a jury instruction defining the culpable mental states was plain error; and (3) that the trial court erroneously admitted evidence that, after Stoner attempted to cash the stolen check, he attempted to cash a second check. For the reasons explained here, we affirm Stoner's convictions.

Why we conclude that the evidence was sufficient

Because Stoner challenges the sufficiency of the evidence supporting his convictions, we must view the evidence in the light most favorable to upholding the jury's verdicts.[2] We therefore recite the evidence in that light.

On January 20, 2013, at some time between eight and ten o'clock in the morning, Arnel Raymundo's wallet and the blank checks it contained were stolen from his car. Around three in the afternoon of that same day, Stoner went to a Wells Fargo bank branch inside an Anchorage Walmart and tried to cash a check drawn on Raymundo's Credit Union 1 account. The check was for $450.

The check that Stoner presented to the bank teller had obvious irregularities. The check was made payable to "Corey Stoner," but it was also signed by "Corey Stoner," even though it was drawn on Raymundo's account. When the teller pointed out that Stoner's name was written in both places on the check, Stoner admitted that he had written the check. According to the teller's testimony at trial, Stoner explained that "he was in a rush when he made the check, so ... he might [have] made a mistake."

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[1] AS 11.46.130(a)(7), AS 11.46.505(a)(1), AS 11.46.285(b)(2), and AS 11.46.140(a)(1), respectively.

[2] *Dorman v. State*, 622 P.2d 448, 453 (Alaska 1981).

The teller refused to honor the check because of these irregularities. Stoner then said that Raymundo was with him in the Walmart, and that he could have Raymundo write another check to him. About thirty to forty-five minutes later, Stoner returned with a second check. This second check was not drawn on Raymundo's credit union account, instead, it was drawn on a Wells Fargo account held by Leonora Raymundo, Arnel Raymundo's wife.

According to the teller, the handwriting on the face of this second check was the same handwriting that was on the face of the first check. The teller refused to honor this second check, and Stoner left. The teller contacted Raymundo, and Raymundo referred the teller to the Anchorage police.

An Anchorage police detective later contacted Stoner by telephone and asked him about this incident. Stoner told the detective that he had received Raymundo's check for snow removal services. The detective explained to Stoner that the check was stolen, and he asked Stoner who had given him the check. In response, Stoner said, "I'll handle that," and "I can't tell you that." Stoner then ended the conversation by saying, "Good luck finding me," and hanging up.

At trial, the Raymundos testified that they did not know Stoner, had not written any checks to him, and were not at the Walmart on January 20, 2013.

On appeal, Stoner argues that the State's evidence was insufficient to establish that his actions were fraudulent and that he intended to steal. Stoner contends that his actions were consistent with someone who believed that he had a legitimate right to Raymundo's check and to the $450. But when we assess the sufficiency of the evidence to support criminal convictions, we view the evidence, and the reasonable inferences to be drawn from that evidence, in the light most favorable to the jury's

verdicts.[3] When viewed in this manner, the evidence was sufficient for fair-minded jurors to conclude beyond a reasonable doubt that Stoner had the requisite culpable mental states for each of the charged offenses.

Why we conclude that the jury instruction defining the culpable mental states was not plain error

The trial court instructed Stoner's jury on the definitions of "intentionally," "knowingly," and "recklessly," which were the culpable mental states that applied to the various elements of the charged crimes. These jury instructions tracked the statutory definitions of "intentionally," "knowingly," and "recklessly" found in AS 11.81.-900(a),[4] but with two additions.

The instruction on "knowingly" told the jurors that "[i]f a person acts 'intentionally,' then that person also acts 'knowingly.'" Likewise, the instruction on "recklessly" told the jurors that "[i]f a person acts 'intentionally' or 'knowingly,' that person also acts 'recklessly.'"

These additions to the definitions of "knowingly" and "recklessly" were drawn from the Alaska Criminal Pattern Jury Instructions on "knowingly" and

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[3] *Hinson v. State*, 199 P.3d 1166, 1170-71 (Alaska App. 2008) (also noting that Alaska law "does not distinguish between a case built on direct evidence and a case built on circumstantial evidence").

[4] *See* AS 11.81.900(a)(1), (a)(2), (a)(3) (statutory definitions of "intentionally," "knowingly," and "recklessly," respectively).

"recklessly."[5] And these pattern jury instructions are based on the provisions of AS 11.81.610(c).[6]

Stoner did not object to the instructions. But on appeal, Stoner argues that the further explanations in the definition of "knowingly" and "recklessly" could have led the jury, once it found that Stoner had acted with the intent to achieve the prohibited result, to neglect to decide the other culpable mental states that applied to the offenses.

For example, Stoner was charged with second-degree theft under the theory that he had committed theft by receiving. Stoner notes that this charge required the jury to find not only that he acted with the intent to deprive Raymundo of property (an access device, *i.e.*, Raymundo's check), but also that he recklessly disregarded the circumstance that the check was stolen. Stoner argues that the language of the jury instruction — specifically, the provision that "[i]f a person acts 'intentionally' or 'knowingly,' that person also acts 'recklessly'" — could have led the jury, once it had decided that he acted with the intent to deprive Raymundo of the check, to believe that it did not need to independently decide whether he acted recklessly with respect to the fact that the check was stolen.

Stoner does not dispute that the jury was correctly instructed as to the culpable mental states that applied to the individual elements of the charged offenses. And in her closing argument, the prosecutor explained — for each charged offense — the elements, the culpable mental states that applied to the elements, and the evidence on which the State was relying to prove each element and its accompanying culpable mental

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[5] *See* Alaska Criminal Pattern Jury Instructions 11.81.900(a)(2) and 11.81.900(a)(3) (revised as of 2007).

[6] AS 11.81.610(c) provides that "[i]f acting knowingly suffices to establish an element, that element is also established if a person acts intentionally[,]" and the statute further provides that "[i]f acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly."

state. Stoner's attorney did not dispute the prosecutor's explanation of these elements and their accompanying culpable mental states. Instead, he argued that the police had conducted a poor investigation and that the State had not satisfied its beyond-a-reasonable-doubt burden of proof.

Plain error from a jury instruction arises only where the instruction "creates a high likelihood that the jury followed an erroneous theory[,] resulting in a miscarriage of justice."[7] In the circumstances of Stoner's case, we think it is extremely unlikely that the jury was misled by the jury instructions in the abstract manner posited by Stoner. We accordingly find no plain error.

Why we conclude that evidence of the second check was admissible

On the first day of Stoner's trial, the branch teller testified that once he told Stoner that he would not honor the first check (that was drawn on Raymundo's Credit Union 1 account), Stoner said that he could get another check from Raymundo. When Stoner returned with a second check, however, it was drawn not on Raymundo's Credit Union 1 account, but on the Wells Fargo bank account of Leonora Raymundo, Arnel Raymundo's wife. The teller also testified that the handwriting on both checks appeared to be the same.

The next day, Stoner objected to the testimony about the second check, arguing that (1) the State had introduced other-act evidence without making a prior application, and (2) the testimony about the second check was inadmissible propensity evidence. Superior Court Judge *pro tem* Warren W. Matthews overruled the objection, stating that the challenged testimony was "all part of the same transaction."

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[7] *Dobberke v. State*, 40 P.3d 1244, 1247 (Alaska App. 2002), *quoted in Iyapana v. State*, 284 P.3d 841, 847-48 (Alaska App. 2012).

On appeal, Stoner renews his argument that the testimony about the second check was inadmissible propensity evidence. *See* Alaska Evid. R. 404(b)(1) (evidence of other acts is admissible to establish intent, knowledge, and for other purposes, but it is not admissible if it is offered solely as character evidence to show that the person acted in conformity with that character). Stoner also argues that the trial court committed plain error in not excluding the evidence under Evidence Rule 403. *See* Alaska Evid. R. 403 (relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice).

We question whether, in the factual circumstances of this case, the testimony about the second check was other-act evidence within the meaning of Evidence Rule 404(b)(1). *See, e.g.*, 2 Stephen A. Saltzburg *et al.*, *Federal Rules of Evidence Manual*, § 404.02[12] (11th ed. 2015) (noting that many courts have ruled that Evidence Rule 404(b) does not apply to other-act evidence where the other act in question is either "inextricably intertwined" with, or close in time and "substantively related" to, the crime charged).

Nevertheless, we do not have to decide this issue. On appeal, the State renews the arguments that the prosecutor made in response to Stoner's objection in the trial court — *i.e.*, that the testimony about the second check was not offered to show Stoner's propensity, but was relevant (1) to negate a claim of mistake by Stoner about the legitimacy of the first check, (2) to prove Stoner's intent to defraud (one of the culpable mental states of second-degree forgery and attempted fraudulent use of an access device), and (3) to prove Stoner's intent to deprive another person of property (one of the culpable mental states of second-degree and attempted third-degree theft). We agree.

We also do not find plain error arising from the trial court's failure to explicitly balance the probative value of the evidence against its potential for unfair

prejudice. The trial court's ruling reflects that it found that the probative value of the evidence was high, and we note that, at Stoner's request, the trial court instructed the jury that Stoner "is not charged with any offense arising from the alleged presentation of a check drawn on a Wells Fargo account in the name of Leonora Raymundo."

We thus conclude that the trial court properly admitted the evidence of the second check.

Conclusion

We AFFIRM the judgment of the superior court.

Judge MANNHEIMER, concurring.

This appeal highlights a flaw in the wording of AS 11.81.610(c) — and a corresponding flaw in the pattern jury instructions based on this statute.

In Stoner's case, the flaw in the jury instructions was harmless. Nevertheless, I think it is helpful to explain the problem in more detail, so that juries can be correctly instructed in future cases.

Our criminal code defines four different culpable mental states: "intentionally", "knowingly", "recklessly", and "with criminal negligence". (These definitions are found in AS 11.81.900(a)(1) - (4).)

AS 11.81.610(c) is intended to codify the principle that when a criminal statute requires proof of a specified culpable mental state, the government can meet its burden by proving that the defendant acted with a more blameworthy culpable mental state. Thus, AS 11.81.610(c) declares:

- that when a statute requires proof that the defendant acted with "criminal negligence", the element in question "is also established if [the defendant] acts intentionally, knowingly, or recklessly";
- that when a statute requires proof that the defendant acted "recklessly", the element in question "is [also] established if [the defendant] acts intentionally or knowingly"; and
- that when a statute requires proof that the defendant acted "knowingly", the element in question "is also established if [the defendant] acts intentionally".

These rules seem very straightforward, but they are actually problematic. The problem lies in the fact that our criminal code divides the elements of crimes into three main categories:

- specified types of *conduct* (*i.e.*, what a defendant did or failed to do);
- specified *circumstances* in which a defendant's conduct is criminal; and
- specified *results* that make a defendant's conduct criminal.

And of the four culpable mental states defined in AS 11.81.900(a), there is no single one that applies to all three of these categories.

Here is a table that summarizes the provisions of AS 11.81.900(a) regarding which culpable mental states apply to which categories of elements:

	Intentionally	Knowingly	Recklessly	Criminal Negligence
Conduct		●		
Circumstances		●	●	●
Result	●	(*)	●	●

I have placed an asterisk in the box for "knowingly" and "result" because there are a few statutes in Title 11 where the legislature has seemingly used "knowing" in a non-standard way — instances where the wording of the statute suggests that the legislature has defined the crime in terms of a person's "knowing" that their conduct will cause, or that it is substantially certain to cause, a particular result. See, for instance, AS 11.41.110(a)(1), which declares that a person commits second-degree murder if they cause the death of another person "knowing that [their] conduct is substantially certain to cause death or serious physical injury".

A more detailed look at this problem

Our criminal code contains crimes that require proof of a specific type of *conduct* — for example, operating a motor vehicle, or possessing a controlled substance. And for these "conduct" elements, the only culpable mental state that applies is "knowingly".

One might think that the culpable mental state "intentionally" would apply to these "conduct" elements of crimes. In everyday English, we often speak of a person "intentionally" engaging in conduct — by which we mean that the person engaged in the conduct deliberately or wittingly, as opposed to accidentally or unwittingly. But our criminal code does not use the word "intentionally" in this way.

As defined in AS 11.81.900(a)(1), the culpable mental state "intentionally" refers only to a person's conscious desire to achieve a particular *result*. It does not refer to whether a person's conduct was deliberate or witting. Rather, our criminal code uses the word "knowingly" to describe witting, non-accidental conduct. In fact, of the four culpable mental states defined in AS 11.81.900(a) — "intentionally", "knowingly", "recklessly", and "with criminal negligence" — "knowingly" is the *only one* that applies to conduct.

This problem was first addressed by this Court in *Neitzel v. State*, 655 P.2d 325 (Alaska App. 1982), where we had to construe a portion of the second-degree murder statute which required proof that a defendant "*intentionally* perform[ed] an act that result[ed] in the death of another person under circumstances manifesting an extreme indifference to the value of human life." We held that the legislature must have meant "*knowingly* performed an act" — because, as defined in AS 11.81.900(a), "knowingly" is the only culpable mental state that applies to conduct, and "intentionally" applies only to the results of conduct. *Neitzel*, 655 P.2d at 326-330.

(We concluded that the legislature's use of the phrase "intentionally performs an act" was probably an unintended hold-over from the Model Penal Code formulation of the statute — because, as defined in the Model Penal Code, the corresponding culpable mental state of "purposely" *does* apply to conduct.[1])

Our decision in *Neitzel* demonstrates that the statute at issue in Stoner's case — AS 11.81.610(c) — is misleading when it describes the relationship of the four culpable mental states.

For example, AS 11.81.610(c) declares that when a statute requires proof that the defendant performed a particular type of conduct "knowingly", this element of the crime "is also established if [the defendant] acts intentionally". This provision of AS 11.81.610(c) is wrong. As this Court explained in *Neitzel*, people do not engage in conduct "intentionally" (as that term is defined in our criminal code). The only culpable mental state that applies to conduct is "knowingly".[2]

AS 11.81.610(c) is similarly misleading with respect to criminal statutes that require proof that the defendant's conduct caused a particular *result*.

For example, a criminal statute might require proof that a defendant acted "recklessly" with regard to the risk that their conduct would result in physical injury to another person. In such cases, AS 11.81.610(c) declares that this element of recklessness is satisfied if the jury concludes that the defendant acted "intentionally" — *i.e.*, if the jury concludes that the defendant did not merely disregard the risk that someone would be injured, but instead acted with the conscious objective of causing injury.

But AS 11.81.610(c) *also* declares that this element of recklessness would be satisfied if the jury found that the defendant acted "knowingly". This portion of the

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[1] *Neitzel*, 655 P.2d at 329-330; Model Penal Code § 2.02(2)(a) (American Law Institute, *Model Penal Code and Comments, Official Draft and Revised Commentary* (1962)).

[2] *Neitzel*, 655 P.2d at 329-330.

statute is misleading — because, under our criminal code, the culpable mental state of "knowingly" does not normally apply to results. Under the definitions set forth in AS 11.81.900(a), the only three culpable mental states that apply to results are "intentionally", "recklessly", and "with criminal negligence".

(As I noted earlier, Title 11 contains a few statutes where it appears that the legislature intended "knowingly" to apply to a result. But these statutes are the rare exceptions to the general rule.)

And finally, a similar problem exists with respect to criminal statutes that require proof that the defendant's conduct was performed under particular *circumstances* that make it criminal. For example, our second-degree sexual assault statute declares that sexual penetration with another person is unlawful if that other person is incapacitated or is otherwise unaware that the sexual conduct is occurring. [3]

As defined in AS 11.81.900(a), there are three culpable mental states that potentially apply to circumstances. A person can act "knowingly" or "recklessly" or "with criminal negligence" with respect to the existence of a specified circumstance. But a person can not act "intentionally" with respect to a circumstance — because, as defined in AS 11.81.900(a)(1), the culpable mental state of "intentionally" only applies to results.

What this means in terms of instructing juries

Currently, Alaska has pattern jury instructions on the definitions of "knowingly" (AS 11.81.900(a)(2)), "recklessly" (AS 11.81.900(a)(3)), and "criminal negligence" (AS 11.81.900(a)(4)). All three of these pattern jury instructions contain

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[3] *See* AS 11.41.420(a)(3)(B)-(C).

recommended language that mirrors the wording of AS 11.81.610(c). According to these recommendations, jurors should be told:

- that if they find that the defendant acted "intentionally," this is sufficient to prove that the defendant acted "knowingly";
- that if they find that the defendant acted either "intentionally" or "knowingly", this is sufficient to prove that the defendant acted "recklessly"; and
- that if they find that the defendant acted "intentionally", "knowingly", or "recklessly", this is sufficient to prove that the defendant acted "with criminal negligence".

These recommendations are wrong because they fail to take account of the three different categories of elements of crimes: (1) elements that require proof of a specific type of *conduct* versus (2) elements that require proof of a particular *circumstance* versus (3) elements that require proof of a particular *result*. Here are the correct rules:

1. *Elements of crimes that require proof of a specific type of conduct*: Juries should *not* be told that if they find that the defendant acted "intentionally", this is sufficient to prove that the defendant acted "knowingly". This is an incorrect statement of Alaska law. Given the way "intentionally" is defined in AS 11.81.900(a)(1), the culpable mental state of "intentionally" applies only to *results*; it does not apply to conduct. "Knowingly" is the only culpable mental state that applies to conduct.

(I acknowledge, however, that this instruction will rarely, if ever, be reversible error — because, as I explained earlier, most people understand the phrase "intentional conduct" to mean exactly the same thing as "knowing conduct".)

2. *Elements of crimes that require proof that the defendant engaged in conduct under particular circumstances*: If a person acts "knowingly" with respect to a circumstance, then that person also acts "recklessly" with respect to that circumstance. Likewise, if a person acts either "knowingly" or "recklessly" with respect to a circumstance, then that person also acts with "criminal negligence" with respect to that circumstance.

3. *Elements of crimes that require proof that the defendant's conduct caused a specific result*: If a person acts "intentionally" with respect to a result, then that person also acts "recklessly" with respect to that result. Likewise, if a person acts either "intentionally" or "recklessly" with respect to a result, then that person also acts with "criminal negligence" with respect to that result.